No. 87-2119

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

RAYMOND I. MOLENAAR,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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QUESTION PRESENTED FOR REVIEW

Did the state courts err in denying petitioner's claim that the prosecutor's misrepresentation of material facts to the grand jury deprived him of his right to a fair grand jury proceeding guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

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No.

In The

Supreme Court of the United States

October Term, 1987

RAYMOND I. MOLENAAR,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Raymond I. Molenaar petitions for a writ of certiorari to review the judgment of conviction of petitioner which was affirmed by the Appellate Division of the Superior Court of the State of New Jersey and which the Supreme Court of the State of New Jersey declined to review.

OPINIONS BELOW

The opinion of the Appellate Division of the Superior Court

of New Jersey is printed infra in Appendix B at 3a to 23a. The order of the Supreme Court of New Jersey denying the petition for certification is printed *infra* at Appendix A at 1a-2a. The judgment of conviction filed May 30, 1986 is printed *infra* in Appendix C at 24a to 27a.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of New Jersey was filed on April 28, 1988. Petitioner invokes the jurisdiction of the Court under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner alleges a violation of his rights under Amendment XIV of the United States Constitution, which reads in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

Petitioner was convicted of possession of cocaine, contrary to N.J. Stat. Ann. 24:21-20, printed *infra* in App. E at 32a. The jury was unable to reach a verdict on the charge of possession of cocaine with intent to distribute, contrary to N.J. Stat. Ann. 24:21-19, printed *infra* in App. E at 30a.

STATEMENT OF THE CASE

A. Procedural History

On May 28, 1985, petitioner Raymond I. Molenaar, Ferdinand Sepulveda and James Cotis were charged in Passaic County Indictment No. 582-85E with conspiracy to distribute cocaine, contrary to N.J. Stat. Ann. 2C:5-2, possession of cocaine, contrary to N.J. Stat. Ann. 24:21-20 and possession of cocaine with intent to distribute, contrary to N.J. Stat. Ann. 24:21-19.

James Cotis pled guilty to possession of cocaine on October 11, 1985, pursuant to the terms of a plea agreement under which he agreed to testify against petitioner Molenaar and Sepulveda in return for the State's recommendation that he receive a conditional discharge. In anticipation of the plea agreement, Cotis gave the Prosecutor's Office a signed statement shifting the blame from himself to petitioner Molenaar and Sepulveda, and depicting himself as a mere consumer of the cocaine.

Petitioner Molenaar moved to dismiss the indictment on the ground of prosecutorial misconduct before the grand jury. Sepulveda joined in the motion; Cotis did not. On October 15, 1985, the Honorable Ralph V. Martin J.S.C., ordered that the indictment be dismissed as to petitioner Molenaar and Sepulveda.

The matter was presented to a second Passaic grand jury on November 15, 1985. The prosecutor named Cotis as a co-defendant along with petitioner Molenaar and Sepulveda, despite the entry of Cotis' plea to the earlier indictment. The second grand jury was never told of Cotis' plea arrangement, and the prosecutor misled the grand jurors about the circumstances in which Cotis' blame-shifting statement was given.

On November 22, 1985, the second grand jury returned

Indictment No. 85-11-1243-1, charging petitioner Molenaar, Sepulveda and Cotis with possession of cocaine, contrary to N.J. Stat. Ann. 24:21-20 and possession of cocaine with intent to distribute, contrary to N.J. Stat. Ann. 24:21-19. On December 16, 1986, Judge Martin dismissed the second sham indictment as to Cotis on motion by the State.

Motions by petitioner Molenaar and Sepulveda to dismiss Indictment No. 85-11-1243-1 on the ground of prosecutorial misconduct before the grand jury were heard by Judge Martin on February 1, 1986 and denied on February 8, 1986.

Petitioner Molenaar and Sepulveda were tried together before the Honorable Frank M. Donato, J.S.C. and a jury, commencing April 14, 1986. On April 18, 1986 the jury returned verdicts of guilty against petitioner Molenaar and Sepulveda on the charge of possession of cocaine. Sepulveda was acquitted of possession of cocaine with intent to distribute. The jury was unable to reach a verdict as to petitioner Molenaar on that charge.

On May 30, 1986 a judgment of conviction was entered sentencing petitioner Molenaar on the charge of possession of cocaine to five years imprisonment. A fine of $25 payable to the Violent Crimes Compensation Board was also imposed. On June 3, 1986, petitioner Molenaar was granted bail pending appeal by the Appellate Division of the Superior Court of the State of New Jersey.

An appeal was argued on October 5, 1987 before the Appellate Division. An opinion affirming petitioner Molenaar's conviction and sentence was filed by that court on December 30, 1987.

A notice of petition for certification to the Supreme Court of the State of New Jersey was filed on January 19, 1988. On January 20, 1988, the Appellate Division granted petitioner

Molenaar bail pending certification. The New Jersey Supreme Court denied certification by order entered April 28, 1988.

B. Factual Background

On the evening of April 4, 1986, petitioner Raymond I. Molenaar and Ms. Rosa Castillo were en route to a concert in Passaic, New Jersey. Ms. Castillo mentioned that she was hungry and petitioner suggested that they stop at a McDonald's restaurant near the theater.

As they drove through the city of Passaic on their way to McDonald's, petitioner saw a friend, Ferdinand Sepulveda, and stopped his vehicle. Sepulveda came over to the car and petitioner told him of his plans for the evening. Sepulveda, a resident of Passaic, was returning from New York City where he was employed as a gem setter. He was carrying with him "jeweler's" paper and a variety of loose gemstones from his work place. Sepulveda entered the car and the three continued on to McDonald's.

Upon arriving at McDonald's, Sepulveda exited the vehicle and recognized a van owned by James Cotis. Cotis was known to Sepulveda as a supplier of cocaine who frequently shared cocaine with Sepulveda. The two men had used cocaine in Cotis' van before, and Sepulveda entered the van believing he might get some free cocaine.

Meanwhile, Ms. Castillo asked petitioner to get her some food from the restaurant. As petitioner exited his vehicle, Sepulveda waved him over to the van. He then introduced the petitioner to Cotis. Petitioner was unaware that Cotis possessed drugs or had supplied Sepulveda with cocaine in the past. Rather, he entered the van at Sepulveda's invitation in order to view the customized interior.

While petitioner was in the rear of the van, Sepulveda, without petitioner's knowledge, obtained a small quantity of cocaine from Cotis and placed it on a piece of jeweler's paper. Cotis had given the sample to Sepulveda from his "stash" which was located in the console of the van.

Shortly thereafter, two plainclothes police officers approached the van. As they approached, Sepulveda threw the jeweler's paper containing the cocaine over his shoulder and Cotis shoved a blue object into petitioner's hand, saying, "Hide this." Petitioner instinctively pushed the object into the area of the dashboard.

The officers entered the van and placed petitioner, Sepulveda, Cotis and Ms. Castillo under arrest. One of the officers retrieved the blue object petitioner had placed under the dash area. The object was later determined to be a plastic bag containing approximately thirteen grams of cocaine which had been wrapped in blue tissue paper. Another piece of blue paper containing .42 grams of cocaine was also located. In addition, the officers recovered two hypodermic needles hidden between the two rear seats and an empty "Deering" gram scale box hidden on the front floor of the van. Cotis later admitted using gram scales to dispense cocaine to friends in the past.

Petitioner, Sepulveda and Cotis were subsequently indicted for conspiracy to distribute cocaine, possession of cocaine, and possession of cocaine with intent to distribute. Cotis pled guilty to possession of cocaine pursuant to the terms of a plea agreement under which he agreed to testify against petitioner and Sepulveda in exchange for the prosecutor's recommendation that he receive a conditional discharge. Cotis also gave the prosecutor's a signed statement shifting the blame from himself to petitioner and Sepulveda and depicting himself as a mere consumer of the cocaine. That indictment was later dismissed as to petitioner and Sepulveda because the prosecutor had provided the grand jury

with incorrect factual information and had improperly referred to petitioner's right to remain silent.

The matter was then presented to a second grand jury. This time, the prosecutor named Cotis as a co-defendant along with petitioner and Sepulveda, despite the entry of Cotis' guilty plea to the earlier indictment. The grand jury was never told of the Cotis plea. They were, however, read Cotis' blame-shifting statement depicting petitioner and Sepulveda as the sellers of the cocaine and Cotis as the purchaser.

After Cotis' statement was read, one grand juror asked if Cotis gave the statement pursuant to a plea bargain. The prosecutor answered that there was no plea bargain, deceiving the grand jurors and concealing Cotis' true motive and interest in giving his statement.

This misrepresentation was part of a larger pattern of deception. In response to an earlier question by a grand juror as to whether Cotis and the police were "working together," the prosecutor interjected that "Mr. Cotis is the defendant in today's action," thus deflecting the juror's inquiry away from an examination of the reasons behind Cotis' accusatory statement. In actuality, Cotis and the police were "working together"; the two parties had entered into a formal plea agreement to ensure Cotis' cooperation. The prosecutor, however, made certain that this agreement was not known to the grand jury.

The second grand jury thereafter indicted petitioner, Sepulveda, and Cotis for possession of cocaine and possession of cocaine with intent to distribute. This sham indictment against Cotis was later dismissed on the prosecutor's motion. Petitioner and Sepulveda were convicted following a jury trial of possession of cocaine. Sepulveda was acquitted of possession of cocaine with intent to distribute, while the jury could not agree upon a verdict as to petitioner on that count.

The Appellate Division of the Superior Court of New Jersey found that it was improper for the prosecutor to initiate the second sham proceeding against Cotis for charges already disposed of in his plea agreement. This deception was further compounded by the prosecutor's concealment from the grand jury of Cotis' relationship with the prosecuting authorities. However, the court reasoned that the prosecutor's misconduct became harmless once a *prima facie* case was presented to the grand jury. The court added that petitioner did not suffer any prejudice as a result of this misconduct because the petit jury could not agree on a verdict on the charge of possession of cocaine with intent to distribute.

C. Issues Raised

The grand jury presentation in this case was fundamentally unfair. The prosecutor presented a sham case against a cooperating co-defendant, whose guilty plea to an earlier indictment was kept from the second grand jury, and whose blame-shifting statement was introduced against petitioner. To complicate matters, the prosecutor further concealed the co-defendant's relationship with the prosecuting authorities by intentionally misrepresenting material facts in response to questions from the grand jurors.

By permitting these prosecutorial deceptions to go uncorrected, the state courts denied petitioner his right to a fair grand jury proceeding guaranteed by the Due Process Clause of the Fourteenth Amendment. The prosecutor deliberately interfered with the grand jury's independent investigative function and deprived the jury of information crucial to its decision whether — and upon what charges — to indict petitioner. A subsequent petit jury verdict cannot undo the irreparable damage done to the integrity of the grand jury process or deter future abuses. This issue was raised below and no relief was granted.

REASONS FOR GRANTING THE WRIT

THE STATE DENIED PETITIONER HIS RIGHT TO A FAIR GRAND JURY PROCEEDING GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY PRESENTING FALSE AND MISLEADING INFORMATION TO THE GRAND JURY.

This Court has not specified when a state indictment may be dismissed because of willful misconduct by a prosecutor before a state grand jury. The prosecutor in this case misrepresented material facts and withheld crucial information which could have reasonably led the state grand jury not to indict petitioner. Specifically, the prosecutor falsely told the grand jury that a cooperating co-defendant, James Cotis, had not given a statement to the prosecuting authorities pursuant to a plea bargain. In actuality, Cotis had received a very favorable plea agreement from the State. The prosecutor further deceived the grand jury by including Cotis as a defendant in the second grand jury presentation even though Cotis had earlier pled guilty to the same charges.

Petitioner submits that the state prosecutor, by knowingly presenting a case that was incomplete and misleading, denied him his right to a fair grand jury proceeding guaranteed by the Due Process Clause of the Fourteenth Amendment. Although states are not required under the federal Constitution to use grand juries, *Alexander v. Louisiana,* 405 U.S. 625, 633 (1970), where a state has chosen to provide grand juries it must ensure that their operation "hew[s] to federal constitutional criteria." *See Carter v. Jury Commission,* 396 U.S. 320, 330 (1970). Under the Due Process Clause of the Fourteenth Amendment, state criminal proceedings must comport with prevailing notions of fundamental fairness. *California v. Trombetta,* 467 U.S. 479, 485 (1984).

It is widely held that a denial of due process occurs where the prosecutor has engaged in presenting fraudulent or misleading evidence. *See, e.g., United States v. Taylor,* 798 F.2d 1337, 1340 (10th Cir. 1986); *United States v. Hogan,* 712 F.2d 757, 761-762 (2nd Cir. 1983); *United States v. Thompson,* 576 F.2d 784, 786 (9th Cir. 1978); *United States v. Estepa,* 471 F.2d 1132, 1136-1137 (2nd Cir. 1972). Similarly, the Due Process Clause of the Fourteenth Amendment bars a prosecutor from withholding exculpatory evidence within his possession from the grand jury. *See, e.g., State of New Jersey ex rel. Kudisch v. Overbeck,* 618 F. Supp. 196, 199-201 (D.C.N.J. 1985); *United States v. Litman,* 547 F. Supp. 645, 649 (W.D. Pa. 1982); *United States v. Gold,* 470 F. Supp. 1336, 1353 (W.D. Ill. 1979); *United States v. Phillips Petroleum Company,* 435 F. Supp. 610, 618-620 (N.D. Okl. 1977); *United States v. DeMarco,* 401 F. Supp. 505, 513-514 (C.D. Cal. 1975), *aff'd,* 550 F.2d 1224 (9th Cir. 1977), *cert. denied,* 434 U.S. 827 (1977).

A state grand jury, like its federal counterpart, cannot perform as a "protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor," *United States v. Dionisio,* 410 U.S. 1, 16-17 (1973), if it is deprived of information through omission or deception which could affect its decision whether or not to indict. *See United States v. Phillips Petroleum Company, supra,* 435 F. Supp. at 619-621; *United States v. DeMarco, supra,* 401 F. Supp. at 513. The role of the grand jury is traditionally that of an investigative body "acting independently of either prosecuting attorney or judge," *Stirone v. United States,* 381 U.S. 212, 218 (1960), whose mission "is to clear the innocent, no less than to bring to trial those who may be guilty." *United States v. Dionisio, supra,* 410 U.S. at 16-17. No grand jury can discharge its constitutional role of protecting the public from hasty, malicious and oppressive prosecution if it is purposely deceived or manipulated by the prosecutor.

Here, there is no question that the prosecutor willfully and repeatedly gave misleading information to the grand jury regarding the government's relationship with petitioner's chief accusor. Cotis' blame-shifting statement was crucial to support a *prima facie* case on the charge of possession of cocaine with intent to distribute. None of the officers at the scene had witnessed an exchange of money or a transfer of narcotics among petitioner, Sepulveda or Cotis. The origin of the narcotics later found in Cotis' van was unknown without reference to Cotis' plea-bargained admission. The grand jury, in attempting to carry out its investigative function, wanted to know why Cotis gave the statement implicating petitioner in the distribution of cocaine.

The grand jury was entitled to know that Cotis had implicated petitioner in narcotics distribution in exchange for a plea bargain from the State, so that it could make an independent judgment as to whether it was appropriate to return an indictment under the circumstances. *See United States v. DeMarco, supra,* 401 F. Supp. at 513. Had the grand jury been informed of Cotis' plea arrangement, there is a reasonable probability or even a substantial possibility that petitioner would not have been indicted. This Court has cautioned that:

> the grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lessor offense; numerous counts or a single count . . . all on the basis of the same facts. Moreover, the grand jury is not bound to indict in every case where a conviction can be obtained [*Vasquez vs. Hillery,* 474 *U.S.* 254, 283 (1986); citations omitted].

It was the purposeful deception and interference by the

prosecutor which prevented the jurors from fully informing themselves of evidence necessary to discharge their constitutional duties.

The failure of the petit jury to agree on a verdict on the charge of possession of cocaine with intent to distribute does not render the prosecutor's misconduct harmless. Had the second grand jury been told the truth, the count charging possession of cocaine with intent to distribute may not have even been returned. The sham presentation against Cotis, compounded by the deceptive statements by the prosecutor, resulted in petitioner's being overcharged. In convicting petitioner of simple possession of cocaine, the petit jury may have reached a compromise verdict influenced by evidence of distribution it would have never heard absent the prosecutor's misconduct before the grand jury. The entire trial was tainted by the overzealous grand jury presentation. It was wrong for the state courts to assume that the fraudulent actions by the prosecutor were harmless.

The recent holding by this Court in *United States v. Mechanik*, 475 U.S. 66 (1986), does not alter this conclusion. In that case, two government agents testified in tandem before a federal grand jury, which thereafter indicted the defendants. The Court of Appeals for the Fourth Circuit reversed the defendants' subsequent convictions on the ground that the simultaneous presence of the two witnesses violated Federal Rule of Criminal Procedure 6(d). This Court reinstated the convictions, holding that the petit jury's finding of guilt rendered the rule violation harmless. *Id.*

In *Mechanik*, no allegations were made that the government attempted to unfairly sway the grand jury or otherwise affect the fairness of the accusatory process. There was no question as to whether the government had transgressed the defendants' right to fundamental fairness. The error of which the prosecutor in

that case was guilty was, at most, technical and did not warrant "reversal of a conviction after a trial free from reversible error." *Id.* at 71.

The issues raised herein, on the other hand, are not of a technical variety. They go directly to petitioner's right to due process and fundamental fairness which a petit jury verdict cannot validate; a petit jury verdict is not a referendum on the fairness of the preceding grand jury presentation. A guilty verdict on a lesser included offense cannot ratify the patent and gross abuse of the grand jury.

If courts take the position that the petit jury affords an accused adequate safeguards against constitutional violations then it is unclear what purpose a grand jury serves. *See* Note, *Grand Jury Proceedings: The Prosecutor, The Trial Judge and Undue Influence,* 39 U. Chi. L. Rev. 761, 775 (1972).

> If the modern grand jury has no reason for being, then the burden is on the people and their legislatures, by statute and constitutional provision, to do away with the grand jury. It is not the courts' function to eviscerate the grand jury's role of "protect[ing] citizens from malicious prosecutions . . ." *State of New Jersey ex rel. Kudisch vs. Overbeck, supra,* 618 *F. Supp.* at 201-202; citations omitted].

If, however, the grand jury is to carry out its independent investigative duties, *Wood v. Georgia,* 370 U.S. 375, 390 (1962), dismissal of the indictment following the verdict at trial must remain available as the only effective method of deterring willful and intentional prosecutorial misconduct. *See United States v. Bari,* 750 F.2d 1169, 1176 (2nd Cir. 1986), *cert. denied,* 472 U.S. 1010 (1985); *United States v. Vetere,* 663 F. Supp. 381, 388

(S.D.N.Y. 1987). The focus of the inquiry must remain on the grand jury's charging decision; the remedy of dismissal is appropriate if it is established that the violation substantially influenced the grand jury's decision to indict, or if there is doubt as to whether it had such effect. *United States v. Mechanik, supra,* 475 U.S. at 76-78 (O'Connor, J. concurring). *See Kotteakos v. United States,* 328 U.S. 750, 765 (1946). Otherwise, prosecutors will be free to engage in prohibited conduct subject only to "purely ceremonial" words of appellate displeasure. *United States v. Antonelli Fireworks Company,* 155 F.2d 631, 661 (2nd Cir. 1946) (Frank, J. dissenting), *cert. denied,* 329 U.S. 742 (1946). *See United States v. Estepa, supra,* 471 F.2d at 1137 ("We cannot . . . content ourselves with yet another admonition.").

It must be emphasized that this was the second grand jury presentation against petitioner arising from the same incident. An earlier indictment had to be dismissed because of previous misconduct by the Passaic County Prosecutor. To sanction such repeated affronts to the integrity of the grand jury "would be to affirm by judicial decision a manifest neglect, if not open defiance, of the prohibition of the Constitution, intended for the protection of the people against such unauthorized action." *See Weeks v. United States,* 232 U.S. 383, 393-394 (1914).

This Court recently agreed to decide the issue when a federal indictment could be dismissed in order to protect the integrity of the grand jury process from, and to deter, willful and repeated misconduct by government prosecutors. *See Bank of Nova Scotia v. United States,* No. 87-578 and *Kilpatrick v. United States,* No. 87-602, 56 L.W. 3449-3450 (January 12, 1988). The need to preserve the fundamental fairness of state grand jury proceedings is equally compelling. Nothing could be more alien to the concept of fairness than an indictment based upon false information supplied to the grand jury by the prosecutor.

CONCLUSION

For the reasons set forth above , the petition for a writ of certiorari should be granted so this Court can review this matter and the petitioner's conviction can be reversed.

Respectfully submitted,

BARRY T. ALBIN
Counsel of Record
JEFFREY L. MENKIN
WILENTZ, GOLDMAN &
SPITZER
Attorneys for Petitioner

Dated: June 27, 1988

APPENDIX A — ORDER OF SUPREME COURT OF NEW JERSEY DENYING CERTIFICATION

SUPREME COURT OF NEW JERSEY
C-841 September Term, 1987
28,279

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

RAYMOND MOLENAAR

Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court,

A petition for certification of the judgment of A-4671-85T4 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied and it is further

ORDERED that the appeal filed in the within matter is dismissed pursuant to *R.* 2:12-9.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 26th day of April, 1988.

Appendix A

s/ Keith M. Endo
ACTING CLERK OF THE
SUPREME COURT

Stamped:

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY

Filed: April 28, 1988

APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-4671-85T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RAYMOND I. MOLENAAR,

Defendant-Appellant.

A-5156-85T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FERDINAND SEPULVEDA,

Defendant-Appellant.

Argued October 5, 1987 - Decided December 30, 1987

Appendix B

Before Judges O'Brien, Havey and Stern.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County.

Barry T. Albin argued the cause for appellant Raymond I. Molenaar (Wilentz, Goldman & Spitzer, attorneys; Mr. Albin, of counsel; Mr. Albin and Eric J. Marcy, on the brief).

Robert N. Abramowitz argued the cause for appellant Ferdinand Sepulveda (Alfred A. Slocum, Public Defendant of New Jersey, attorney; Mr. Abramowitz, Designated Counsel, of counsel and on the brief).

Edward R. Bonanno, Deputy Attorney General, argued the cause for respondent (W. Cary Edwards, Attorney General of New Jersey, attorney; Mr. Bonanno, of counsel and on the brief).

PER CURIAM

Defendants appeal from their convictions of possession of a controlled dangerous substance (*N.J.S.A.* 24:21-20a).[1] Defendant Molenaar was sentenced to a term of five years, and defendant Sepulveda was sentenced to a term of four years. Appropriate

1. On a second count charging possession of a controlled dangerous substance with intent to distribute, defendant Sepulveda was acquitted and a mistrial was declared as to defendant Molenaar since the jury was unable to agree upon a verdict.

penalties payable to the Violent Crimes Compensation Board were imposed on both defendants.

Although defendants have filed separate appeals, we have chosen to issue one opinion since some of their appellate arguments are the same. We will separately address the additional appellate arguments made by each defendant.

Defendants were arrested on April 4, 1985 in the parking lot of a McDonald's restaurant in Passaic. On that day, two detectives from the narcotics squad were working in an undercover capacity in an unmarked vehicle. They had parked their vehicle in the McDonald's parking lot and were engaged in conversation with an off-duty fellow detective, when they observed a van enter the parking lot and park in such a manner that its windshield faced the police vehicle located approximately 50 feet away. The parking lot was well lit by overhead lighting. The driver of the van, later identified as James Cotis (Cotis) remained in the van for approximately five minutes when a BMW automobile pulled into the parking lot and parked next to the van. The BMW was driven by Molenaar, with Sepulveda as a passenger.[2] Defendants got out of the BMW and entered the van through the passenger-side door. Molenaar sat in the front passenger seat and Sepulveda moved to the rear of the van.

Detective Williams testified to his observation of the parties in the van, "I could see the tops of their heads looking down, putting their heads back up and looking at something . . . [and] just an ordinate [sic] amount of movement inside the van itself." The officers moved their vehicle "[t]o get a closer look at what was taking place inside of the van itself." The officers got out

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2. There was also a female passenger in the vehicle.

of their vehicle and approached the van on either side. Detective Williams testified that as he approached the van:

> The driver just looked at me. And I was able to observe Mr. Molenaar, who was in the passenger side of the seat, he had a blue object in his hand. And he looked at me and he just put the object underneath the dashboard of the vehicle.
>
> Simultaneous to that I observed this Mr. Sepulveda seated in the back seat and I observed him throw a blue object over his head. And I was able to detect particals [sic] of white powder coming down inside of the van.

At this point, the officers identified themselves and searched the van and the BMW. Under the dashboard of the van they found a blue package containing a substance later determined to be cocaine, either in the heating duct or the air conditioning duct. They also retrieved another blue packet in the back of the van, also determined to contain cocaine. Since this was the packet from which the officer had observed white powder fall, a hand-held vacuum, found in the BMW automobile, was used to vacuum the white powder that had fallen from the package. Two hypodermic needles and an empty box for a "Deering gram scale" was also found in the van. A search of Molenaar revealed that he had $991 in cash, and both he and Sepulveda had telephone pagers or beepers in their possession. A small packet containing blue paper[3] similar to the type he had previously thrown over his shoulder was found on Sepulveda.

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3. Sepulveda testified this was paper used to wrap precious stones in connection with his employment as a diamond cutter.

Appendix B

PROSECUTORIAL MISCONDUCT

Molenaar, Sepulveda and Cotis were indicted on May 20, 1985 in a three-count indictment, #582-85-E, charging (1) conspiracy to distribute cocaine, (2) possession of cocaine, and (3) possession of cocaine with intent to distribute. On August 12, 1985, Cotis gave a written statement to the prosecutor's office in which he stated that he had contacted Sepulveda through his beeper and arranged to meet in the McDonald's parking lot to buy cocaine from Sepulveda. He described how Sepulveda and Molenaar got into his van, and said that he handed Molenaar $900 which Molenaar gave to Sepulveda to count, after which Molenaar handed him a small package which he told Molenaar to put in the pouch in the van.

On October 11, 1985, Cotis entered into an agreement with the prosecutor whereby he agreed to plead guilty to the count charging possession of cocaine and to testify against Molenaar and Sepulveda. The prosecutor agreed to recommend dismissal of the charges of conspiracy and possession with intent to distribute, as well as related disorderly persons offenses. The State also agreed to recommend that Cotis be admitted into a conditional discharge program pursuant to *N.J.S.A.* 24:21-27.

Thereafter, on October 15, 1985, on Molenaar's motion, indictment #582-85E was dismissed on the ground of prosecutorial misconduct. On November 15, 1985, the prosecutor again presented the matter to the grand jury. Both defendants allege prosecutorial misconduct during this presentation. Sepulveda joined in Molenaar's motion to dismiss the indictment because of the alleged prosecutorial misconduct.

After a prosecutor's investigator read Cotis' written statement

to the grand jury, the following colloquy ensued between a juror, the investigator, and the assistant prosecutor:

> MR. GRADISHER [assistant prosecutor]: We have a question from one of the Grand Jurors.
>
> A JUROR: What is a county investigator?
>
> THE WITNESS [investigator Pfeiffer]: I'm an investigator for the Prosecutor's Office for the county of Passaic. I investigate cases that are pending and investigations that are initiated by this office.
>
> A JUROR: But, in his report you had prearranged the meeting with the other guy?
>
> THE WITNESS: Well, if I can ask you a question. The persons that were present at the meeting were Mr. Cotis, his attorney, Mr. Muti, Chief Assistant Prosecutor Donald Campolo, and myself as the investigator for the Prosecutor's office.
>
> A JUROR: You and Mr. Cotis were working together?
>
> MR. GRADISHER: What do you mean by working together?
>
> A JUROR: Working for the Prosecutor's Office.
>
> MR. GRADISHER: Mr. Cotis is not employed by the Prosecutor's Office. Mr. Cotis is the

defendant in today's action.

* * *

A JUROR: Under what circumstances did he give the statement? Is this a plea bargain?

MR. GRADISHER: No. You don't have to answer that question. If you are questioning the voluntariness of that statement that is a legal question. You do not get involved in legal questions. You get involved in questions of fact.

A JUROR: Was it voluntary?

MR. GRADISHER: That is a legal question. As I said before you do not get involved in legal questions such as was he given his Miranda rights before he gave the statement. That is a legal question. Those are legal questions. Are there any further questions of this investigator?

The grand jury returned indictment #85-11-1243-I, charging Molenaar, Sepulveda and Cotis with possession of cocaine and possession with intent to distribute. On motion of the State, the indictment was dismissed as to Cotis because of his previous plea to the same charge contained in indictment #582-85E.

Defendants claim the prosecutor misled the jury in the quoted colloquy in not permitting the juror's inquiry as to whether Cotis' statement was pursuant to a plea bargain and by including Cotis in the presentment resulting in the return of a new indictment against Cotis. Although the judge recognized some "negligence"

on the part of the prosecutor's office, he concluded that the indictment was not fatally flawed by this credibility issue since there was sufficient independent evidence from the arresting officer who witnessed the alleged unlawful conduct, and thus denied the motion to dismiss the indictment. We affirm that ruling by the trial judge substantially for the reasons given by him in his opinion of Feburary 28, 1986.

The principal thrust of the Cotis statement read to the grand jury was that Sepulveda agreed to sell cocaine to Cotis and that the money in payment was given to Molenaar. Sepulveda was acquitted of the count charging him with possession of the cocaine with intent to distribute, and the jury was unable to agree on that count as to Molenaar. Although that charge remains open as to Molenaar, it is obvious that any misconduct by the assistant prosecutor in his presentation to the grand jury in no way prejudiced either defendant.

As we said in *State v. Schamberg,* 146 *N.J.Super.* 559, 563, 564 (App. Div. 1977), certif. den. 75 *N.J.* 10 (1977):

> The prejudicial effect of prosecutorial conduct must be judged from a different viewpoint when it occurs before a grand jury as compared with a petit jury. Improper and overreaching comments before a petit jury often results in judicial intervention through mistrial or reversals because of the court's sensitivity to the prejudicial impact of a prosecutor's comment upon the body which determines the guilt or innocence of defendant. Contrariwise, a chance remark or improper question before a grand jury does not affect the ultimate determination of the defendant's guilt and

> therefore should not be judged with as critical an eye. [Citations omitted.]
>
> Unless the prosecutor's misconduct before a grand jury is extreme and clearly infringes upon the jury's decision-making function, it should not be used as a stepping stone to dismissal of an indictment. As has often been observed, an indictment should only be quashed on the clearest and plainest grounds.

In determining the sufficiency of the evidence to sustain the indictment every reasonable inference is to be given to the State. *State v. New Jersey Trade Waste Association,* 96 *N.J.* 8, 27 (1984). Further, the evidence need not be sufficient to sustain a conviction, but merely sufficient to determine that there is *prima facie* evidence to establish that a crime has been committed. *Ibid.* Based upon the officer's testimony, defendants could have been properly indicted even without the Cotis statement.

We note, however, our disapproval of the manner of presentation of this matter to the grand jury for the second time. At that time, Cotis had already pled guilty to one count of the earlier indictment pursuant to an agreement with the prosecutor. We recognize that this plea agreement was subject to the approval of the court. We also recognize that the statement in question had been given by Cotis before he formally entered his plea, although with the clear expectation by him that an agreement would be reached with the prosecutor. It was improper for the prosecutor to seek reindictment of Cotis for the same charge to which he already entered a plea of guilty, although he had not yet been sentenced. Nonetheless, we find this misconduct to be harmless to the defendants in this case, as noted.

Appendix B

THE MOTION TO SUPPRESS

Defendants both contend the police conducted an unlawful search and seizure in violation of the Fourth Amendment of the United States Constitution and Article 1, paragraph 7 of the New Jersey Constitution. Both raised this issue at a pretrial motion to suppress the evidence.

After a hearing at which one of the officers testified, the trial judge denied the motion to suppress. At the hearing, the officer described his observations that night in the McDonald's parking lot. Because of their suspicion that a drug transaction was occurring in the van, the officers parked next to the van so they could question the occupants. In his direct testimony, one of the officers described his observations of Molenaar placing a blue object under the dashboard and Sepulveda throwing a blue object into the back of the van. He did not testify as to his observation of white powder falling from the blue object, nor had this fact been contained in the police report, nor testified to before the grand jury. However, on cross-examination after a recess, the officer testified to white powder coming out of the package which Sepulveda threw to the rear of the van, and that this was why he directed that the carpet in the rear of the van be vacuumed. The court observed:

> I was troubled by the search until the police officer said he saw the white powder. Then it's a plain view case as I see it.

Later, the judge questioned the prosecutor:

> Mr. Prosecutor, what I'm mostly interested in from your perspective and both counsel have pointed

> it out, is the fact that this police officer, all of a sudden, one year after the incident, after direct examination and after lunch, suddenly remembers that he saw white powder being thrown in the back of the van.

The judge noted it was his duty to judge the credibility of this officer as a witness. However, in reaching his decision on the day following the hearing, the trial judge found the testimony of the officer to be credible. The judge said:

> . . . and I do find him to be credible. There's nothing to contradict his testimony. I believe his testimony mainly from the fact, and I failed to point this out, that immediately thereafter, they vacuumed the floor of the van and white powder turned up. Perhaps not enough to be examined by the State Police but there definitely is white powder contained in S-5. And why would they vacuum the van if the police officer didn't see white powder coming from the blue tissue?

The findings by the trial judge are reasonably supported in the record below and are binding upon us. *See State v. Johnson,* 42 *N.J.* 146, 162 (1964). The denial of the motion to suppress is affirmed substantially for the reasons given by the trial judge in his oral opinion of April 11, 1986. The search was conducted pursuant to the plain view exception. *See Texas v. Brown,* 460 *U.S.* 730, 103 *S. Ct.* 1535, 75 *L.Ed.* 2d 502 (1983), and *State v. Bruzzese,* 94 *N.J.* 210, 235-238 (1983), *cert.* den. 465 *U.S.* 1030, 104 *S.Ct.* 1295, 95 *L.Ed.* 2d 695 (1984).

Appendix B

THE PROSECUTOR'S SUMMATION

Defendant Molenaar argues that the trial judge improperly permitted the prosecutor to make comments during his summation as to the cost of cocaine when purchased in large quantities. A detective had testified that cocaine sells for approximately $100 per gram, so that the total value of the cocaine involved in this case ws $1,400. He said that cocaine usually sells for $100 per gram, although it can sell for $125 or $150, depending on the quality, and that "rock" cocaine is sometimes of a higher quality. Some of the cocaine recovered in this case was in the form of "rock". Cotis had testified that he gave $900 to Molenaar in payment for the cocaine which he purchased; $991 were found in Molenaar's possession. In his summation, the prosecutor said:

> Mr. Cotis says he paid $900 for the half ounce of cocaine. And S-3 has been analyzed by the State Police and you heard the testimony that it's 13.81 grams of cocain [sic], just slightly under a half ounce of cocaine. Mr. Cotis paid $900 for it.
>
> Detective Williams told you how it could go for $100 an ounce, higher for better purity. Mr. Cotis is buying in bulk and you get a cut rate normally.

At that point, Molenaar's attorney objected, saying:

> I object. There's no testimony. The Prosecutor is testifying. He could have asked that from Detective Williams and apparently he omitted that question.

The trial judge stated in the presence of the jury:

Appendix B

> I think it can be inferred and we all know if you buy one of an item it's one price and if you buy a lot of it, it's cheaper.

When defense counsel again objected, the judge continued saying:

> I think it can be inferred. It's up to the jury to decide, but I think it's an inference that can be drawn from the testimony at this trial and your objection is overruled.
>
> Go ahead, Mr. Prosecutor.
>
> [Prosecutor] Thank you, Judge. He's buying in bulk. And also he doesn't take a look at what's inside this because he's dealt with Mr. Sepulveda before. He knows what to expect. He's bought cocaine from him before.

At the conclusion of the summations and further objection by defense counsel, the trial judge reiterated his ruling out of the presence of the jury, saying:

> I think it's common sense. I mean, it's just common sense that if you buy by the case — if you buy peas by the case, you get them cheaper than buying them in individual cans. If you buy eggs in bulk you get them cheaper. No matter what you buy, if you buy it in bulk it comes cheaper and that's why I think it's an appropriate comment for the Prosecutor to make.
>
> And I don't think there has to be any evidence

> to support it because almost everything you buy in bulk you get cheaper. That's why I permitted it. I think it can be inferred from the evidence.

A prosecutor is entitled to great latitude in his summation as long as he stays within the evidence and the legitimate inferences to be drawn therefrom. *State v. Kelly,* 97 *N.J.* 178, 218 (1984); *State v. Farrell,* 61 *N.J.* 99, 102 (1972); *State v. Hill,* 47 *N.J.* 490, 499 (1966). We conclude that the prosecutor's comment, unsupported by any evidence, was error and was compounded by the trial judge's comments in ruling upon defendant's objection. However, we find the error harmless since it clearly was in support of the State's contention, supported by Cotis' testimony, that he purchased the cocaine from Sepulveda and paid Molenaar $900 for it. Neither defendant was convicted of the charge of possession of cocaine with intent to distribute, although the jury was unable to agree as to Molenaar. Under the circumstances, the error was harmless. Sepulveda admitted his possession of the cocaine. Molenaar did not testify and offered evidence to show why he possessed the $991 and the beeper. At least some of the jurors accepted his explanation since they could not agree upon his guilt of possession with intent to distribute.

THE OPINION EVIDENCE BY THE POLICE OFFICER

Defendant Molenaar contends it was error for the trial judge to permit Detective Williams to testify since he had not qualified as an expert. The prosecutor offered Detective Williams as an "expert in narcotics concerning package and sales and distribution." Molenaar's attorney objected to Williams' qualification as an expert witness since the prosecutor had failed to supply his name or his opinion in pretrial discovery. Over objection, the trial judge permitted Williams to testify, but he instructed the jury that Williams "will not be qualified as an expert

witness in this trial but can give us certain opinions because of his experience."

On this appeal, Molenaar contends it was error to permit Williams to testify as a lay witness and yet give his opinion.[4] From our review of the evidence, several opinions were given by the officer, *i.e.:*

> Q. Detective, based upon your experience, what did you believe you had seen.
>
> MR. ALBIN: I object, your Honor.
>
> THE COURT: I'll allow it.
>
> A. A drug transaction had taken place . . . [inside of the van].

Later in his testimony, Detective Williams testified as to having come across telephone beepers in his experience. He explained how such beepers are used in drug transactions. This also was allowed over defense counsel's objections.

The officer was probably qualified as an expert to give his opinion on the subjects inquired about. The only reason the trial judge did not qualify him as an expert was the failure to disclose his name and his opinion in discovery as required by *R.* 3:13-3(a)(11).

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4. We note that the basis of Molenaar's objection to the prosecutor's summation as to the purchase of cocaine in bulk was based upon the opinion evidence given by Detective Williams as to the value of cocaine.

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We assume defendant requested this information which was not furnished and, pursuant to the rule, this could result in barring the witness from testifying to his opinions at the trial. However, *R.* 3:13-3(f) provides as alternative sanctions that the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or it may enter such other order as it deems appropriate.

In this case, the trial judge chose to advise the jury that the detective would not be testifying as an expert, but, nonetheless, permitted him to express opinions. In this the judge was in error. On Molenaar's motion for a new trial the trial judge recognized this. Based upon *State v. Burgos,* 185 *N.J. Super.* 424 (App. Div. 1982), the judge suggested that a police officer may give his opinion based upon his experience without qualifying as an expert. We do not read the *Burgos* case to so state. However, we have held that a lay witness, if sufficiently experienced and trained, may testify generally as to the observable reactions of drug users and of the techniques of the use. *State v. Jackson,* 124 *N.J. Super.* 1, 4 (App. Div. 1973). However, in our opinion, testimony that certain conduct reflects a drug transaction in progress or as to the use of beepers in drug operations and the value of narcotics require the qualification of the police officer as an expert under *Evid. R.* 56(2).

However, we conclude the error was harmless since it was relevant only to the possession with intent to distribute upon which neither defendant was convicted. Further, there was substantial other evidence of the drug transaction. The officer testified as to his observations as a fact witness, Cotis testified as to the drug transaction, and defendant Sepulveda acknowledged possession of the cocaine. We recognize that Molenaar did not testify, but we are satisfied that the opinion evidence offered in the State's

case in violation of the discovery rule was so minimal as not to constitute any prejudice to defendant Molenaar. Sepulveda does not complain about the introduction of this evidence.

THE SENTENCE

Both defendants attack the sentences imposed upon them.

(a) *Sepulveda's Sentence.* Sepulveda, who had no prior record, was sentenced to a four-year custodial term. In reliance upon *State v. Sobel,* 183 *N.J. Super.* 473 (App. Div. 1982), defendant contends that he was entitled to the presumption of a noncustodial sentence pursuant to *N.J.S.A.* 2C:44-1e. Assuming the applicability of that section of the code to a Title 24 offense, we note that it contains a proviso:

> . . . unless, having regard to the nature and circumstances of the offense and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for the protection of the public under the criteria set forth in subsection a.

The trial judge concluded that imprisonment of Sepulveda was necessary for the protection of the public. In his statement of reasons pursuant to *R.* 3:21-4(e), the trial judge noted the presumption of a noncustodial sentence and then set forth the aggravating circumstances: (1) the risk that defendant will commit another offense; (2) there is a substantial likelihood the defendant is involved in organized criminal activity; (3) the need for deterring the defendant and others from violating the law; (4) the defendant failed to report as ordered on bail supervision; (5) there are no mitigating circumstances, therefore the court imposed the

presumptive four-year term as for a third degree offense.

As supplemental reasons, the court stated:

> This defendant has shown no regard for authority. he is not a candidate for probation supervisions and is headed for further involvement with the Criminal Justice System. To the Probation Officer he denied using drugs for over a two (2) year period. At the trial he testified he was a drug addict. He refused to indicate whether or not he had any weapons but said he was a diamond cutter and every one of them carries weapons. He never reported for bail supervision. He refused to disclose any profits from a business owned by his family including himself. He indicated income of $37,000 per year, minimally $550.00 a week but did not file any Income Tax Returns. He is in arrears over $800.00 in child support but feels that it is not the court's business to know how he supports his child.
>
> The evidence at the trial disclosed that this defendant was a major drug dealer involved in narcotics distribution by using sophisticated highly technical paging systems.

We recognize that defendant was acquitted of the charge of possession with intent to distribute cocaine. However, there was evidence presented at the trial from which the judge could infer defendant's involvement in organized crime as a drug dealer. Although the supplemental observations by the trial judge do not specifically fit within the categories of aggravating factors as delineated in the code, in sentencing the trial judge may consider

the "whole man." *See State v. Sainz,* 107 *N.J.* 283, 293 (1987); *State v. Bausch,* 171 *N.J. Super,* 314, 321 (App. Div. 1979), mod. 83 *N.J.* 425 (1980); *State v. Green,* 62 *N.J.* 547, 566 (1973). Obviously, defendant's lack of cooperation with the probation officer in preparation of the presentence report and his failure to comply with the law by not filing an income tax return or a court order by not paying child support, reflect upon his ability to comply with probationary supervision. We are satisfied that the reasons given by the trial judge support his determination to impose a four-year custodial term on this defendant, notwithstanding the mitigating factor that this was his first offense.[5] Since the presumption of nonimprisonment was overcome, a prison sentence was appropriate. *Cf. State v. Hartye,* 105 *N.J.* 411 (1987).

(b) *Molenaar's Sentence.* As with Sepulveda's sentence we have reviewed the sentence imposed upon Molenaar pursuant to the admonitions of the Supreme Court in *State v. Roth,* 95 *N.J.* 334 (1984), and *State v. Hodge,* 95 *N.J.* 369 (1984), and find (1) that the proper sentencing guidelines have been followed; (2) that there is substantial evidence in the record to support the findings of fact upon which the sentencing judge based his application of the guidelines,[6] and (3) that the trial judge did not

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5. Although the trial judge did not specifically identify this as a mitigating circumstance, he obviously recognized this in referring to the potential application of the presumption of a noncustodial term.

6. We agree with both defendants, however, that the evidence did not support the trial judge's conclusion that they were both part of a "major drug dealing operation" except by inference. The judge said:

> Raymond Molenaar is a major drug dealer in Passaic. That's

(Cont'd)

clearly err in applying those guidelines to the relevant facts. Molenaar had a criminal record, prior arrests for possession of cocaine, and a conviction for burglary. He received a conditional discharge on a charge of possession of cocaine which he violated by submitting a urine specimen testing positive for cocaine and his conditional discharge was terminated without improvement.

As noted in connection with the sentencing of Sepulveda, there was evidence at the trial that Cotis purchased cocaine from Sepulveda and paid $900 for it which he gave to Molenaar. There was evidence that Sepulveda was contacted by use of his beeper, and the police officer testified as to the use of beepers in drug transactions. Molenaar also had a beeper. We recognize that the jury was unable to agree on the charge of possession with intent to distribute the cocaine, but, nonetheless, there was evidence from which the trial judge could reach the conclusion that defendant was involved with organized crime.

In his statement of reasons for sentence pursuant to *R.* 3:21-4(e), the trial judge found the following aggravating

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(Cont'd)

> the bottom line figure. And he was selling drugs to individuals who are coming to Passaic from outlying communities either to buy drugs from him or to go to a rock concert. Raymond Molenaar was the source. He indicated that he never — and that's the only thing I checked outside of his record — checked on the presentence report. He says he never used drugs or has a minimal drug habit. What was he doing with almost a half ounce of cocaine?

We conclude that the trial judge's reference to what he "checked outside of his record" refers to other things in the presentence report besides his criminal record. His reference to operating a foreign sports car probably refers to the BMW he was operating on the day in question.

circumstances: (1) the risk that defendant will commit another offense; (2) there is a substantial likelihood the defendant is involved in organized criminal activity; (3) the extent of defendant's prior criminal record and the seriousness of the offenses of which he has been convicted, and (4) the need for deterring the defendant and others from violating the law. He found no mitigating circumstances, although based upon the statement of Molenaar's attorney, the judge decided not to impose a period of parole ineligibility as he had originally intended. He also suggested that defendant may qualify for the intensive supervision program. We agree with this analysis and find no error in the imposition of a five-year custodial term.

Affirmed.

Stamped:

I hereby certify that the foregoing
is a true copy of the original on file
in my office.
s/ Jack G. Trubenbach
Clerk of the Appellate Division

APPENDIX C — JUDGMENT OF CONVICTION

NEW JERSEY SUPERIOR COURT
PASSAIC COUNTY
LAW DIVISION - CRIMINAL

S.B.I. No. 706212A
DATE OF ARREST

THE STATE OF NEW JERSEY

vs.

RAYMOND MOLENAAR

Defendant

(INDICTED WITH OTHERS)
Filed June 6, 1986

JUDGMENT OF CONVICTION
AND ORDER FOR COMMITMENT

The defendant on November 22, 1985 was indicted on Indictment 85-11-1243-I

The defendant on December 19, 1985 entered a plea of not guilty to the Indictment for the crimes of:

UNLAWFUL POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE (COUNT ONE) N.J.S. 24:21-20

POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE WITH INTENT TO DISTRIBUTE (COUNT TWO) N.J.S. 24:21-19a(1)

and the defendant having on April 14, 1986 BEEN TRIED with

Appendix C

A JURY AND A verdict OF GUILTY TO:
COUNT ONE ABOVE having been rendered on April 18, 1986

It is, therefore, on May 30, 1986

Ordered and Adjudged that the defendant be and is sentenced COUNT ONE: To imprisonment for a term of FIVE (5) YEARS and is committed to the custody of the Commissioner of the Department of Corrections for the term of the sentence and until released in accordance with the law.

If the offense occurred prior to January 9, 1986, a penalty of $25 is imposed on each count on which the defendant was convicted unless the box below indicates a higher penalty pursuant to N.J.S.A. 2C:43-3.1.

Total VCCB Penalty $25

IT IS FURTHER ORDERED THAT THE SHERIFF DELIVER THE DEFENDANT TO THE AFORENAMED INSTITUTION TO SERVE HIS SENTENCE.

STATEMENT OF REASONS REQUIRED BY R. 3-21-4a(e) APPEARS ON THE REVERSE SIDE: COUNT TWO - HUNG JURY

Appendix C

Defendant to receive R. 3:21-8
credit for time spent in custody
From 4/4/85 to 4/5/85
Day credit: Two

ATTORNEY FOR DEFENDANT
Upon entry of Guilty Plea or Conviction

Barry Albin, Esq.

At Time of Sentencing

Barry Albin, Esq.

s/ W. L. Kattak
County Clerk

May 30, 1986

STATEMENT OF REASONS, R. 3:21-4(e)

The Court imposes the maximum (five years) term on this third degree offense.

AGGRAVATING CIRCUMSTANCES:

The risk that the defendant will commit another offense.

There is a substantial likelihood the defendant is involved in organized criminal activity.

The extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted.

Appendix C

The need for deterring the defendant and others from violating the law.

There are no mitigating circumstances.

s/ Frank M. Donato, Judge
FRANK M. DONATO, J.S.C.

DEFENDANT TO BE DELIVERED
TO PRISON RECEPTION AND
CLASSIFICATION CENTER

APPENDIX D — INDICTMENT

NEW JERSEY SUPERIOR COURT
PASSAIC COUNTY
LAW DIVISION
(CRIMINAL)

Indictment No. 85-11-1243-1

THE STATE OF NEW JERSEY

vs.

A. RAYMOND MOLENAAR
B. JAMES T. COTIS
C. FERDINAND SEPULVEDA

Defendants

UNLAWFUL POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE (A1,B1,C1)
POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE WITH INTENT TO DISTRIBUTE (A1,B1,C1)

The Grand Jurors of the State of New Jersey for the County of Passaic upon their oath present that Raymond Molenaar, James T. Cotis and Ferdinand Sepulveda, on or about the 4th day of April 1985 in the City of Passaic in the County of Passaic and within the jurisdiction of this Court, did knowingly or intentionally possess a certain controlled dangerous substance, namely cocaine, contrary to the provisions of N.J.S. 24:21-20, and against the peace of this State, the Government and dignity of the same.

Appendix D

COUNT 2

And the Grand Jurors aforesaid, upon their oath, do further present that Raymond Molenaar, James T. Cotis and Ferdinand Sepulveda, on or about the 4th day of April 1985 in the City of Passaic in the County of Passsic and within the jurisdiction of this Court, did knowingly or intentionally possess or have under their control a certain controlled dangerous substance, namely cocaine, with intent to distribute same, contrary to the provisions of N.J.S. 24:21-19 a (1), and against the peace of this State, the Government and dignity of the same.

JOSEPH A. FALCONE,
PROSECUTOR
WILLIAM F. GRADISHER,
ASSISTANT PROSECUTOR

Endorsed: A TRUE BILL

s/ Mary A. Fiorenzo
MARY A. FIORENZO, FORELADY

Prosecutor's Docket No. 85-494
Municipal Docket No. A) GJA 1st, 2nd
B) GJA 1st, 2nd
C) GJA 1st, 2nd

Dated: September 11, 1986

APPENDIX E — RELEVANT STATUTES

24:21-19. Prohibited acts A.—Manufacturing, distributing, or dispensing—Penalties

a. Except as authorized by this act, it shall be unlawful for any person knowingly or intentionally:

(1) To manufacture, distribute, or dispense, or to possess or have under his control with intent to manufacture, distribute, or dispense, a controlled dangerous substance; or

(2) To create, distribute, or possess or have under his control with intent to distribute, a counterfeit controlled dangerous substance.

b. Any person who violates subsection a. with respect to:

(1) A substance, in a quantity of less than one ounce including any adulterants or dilutants, classified in Schedules I or II[1] which is a narcotic drug, or in a quantity of 1 ounce or more with there being included less than 3.5 grams of the pure free base Schedule I or II narcotic drug, is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 12 years, a fine of not more than $25,000.00 or both; or

(2) A substance, in a quantity of one ounce or more including any adulterants or dilutants, classified in Schedules I or II which is a narcotic drug, provided that there are included at least 3.5

grams of the pure free base Schedule I or II narcotic drug, is guilty of a high misdemeanor and shall be punished by imprisonment for up to life, a fine of not more than $25,000.00 or both; or

(3) Any other controlled dangerous substance classified in Schedules I, II, III or IV[2] is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 5 years, a fine of not more than $15,000.00, or both; or

(4) A substance classified in Schedule V[3] is guilty of a misdemeanor and shall be punished by imprisonment for not more than 1 year, a fine of not more than $5,000.00, or both.

L.1970, c. 226, § 19. Amended by L.1971, c. 3, § 8; L.1975, c. 31, § 1, eff. March 7, 1975.

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1. Sections 24:21-5, 24:21-6.

2. Sections 24:21-5 to 24:21-8.

3. Section 24:21-8.1.

Appendix E

24:21-20. Prohibited acts B.—Possession, use or being under influence—Penalies

a. It is unlawful for any person, knowingly or intentionally, to obtain, or to possess, actually or constructively, a controlled dangerous substance unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this act. Any person who violates this section with respect to:

(1) A substance, in a quantity of less than 1 ounce including any adulterants or dilutants, classified in Schedule I or II[1] which is a narcotic drug, or in a quantity of 1 ounce or more with there being included less than 3.5 grams of the pure free base Schedule I or II narcotic drug and any other controlled dangerous substance classified in Schedule I, II, III or IV[2] is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 5 years, a fine of not more than $15,000.00, or both, except as provided in subsection a. (4) below;

(2) A substance, in a quantity of 1 ounce or more including any adulterants or dilutants, classified in Schedule I or II which is a narcotic

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1. Sections 24:21-5, 24:21-6.

2. Sections 24:21-5 to 24:21-8.

drug provided that there are included at least 3.5 grams of the pure free base Schedule I or II narcotic drug, is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 7 years, a fine of not more than $15,000.00, or both;

(3) Any controlled dangerous substance classified in Schedule V[3] is guilty of a misdemeanor and shall be punished by imprisonment of not more than 1 year, a fine of not more than $5,000.00, or both; or

(4) Possession of more than 25 grams of marihuana, including any adulterants or dilutants, or more than 5 grams of hashish is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 5 years, a fine of not more than $15,000.00, or both; provided, however, that any person who violates this section with respect to 25 grams or less of marihuana, including any adulterants or dilutants, or 5 grams or less of hashish is a disorderly person.

b. Any person who uses or who is under the influence of any controlled dangerous substance, as defined in this act, for a purpose other than the treatment of sickness or injury as prescribed or administered by a person duly authorized by law to treat sick and injured human beings, is a disorderly person.

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3. Section 24:21-8.1.

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In a prosecution under this subsection, it shall not be necessary for the State to prove that the accused did use or was under the influence of any specific narcotic drug or drugs, but it shall be sufficient for a conviction under this subsection for the State to prove that the accused did use or was under the influence of some controlled dangerous substance or counterfeit controlled dangerous substance as defined in this act, by providing that the accused did manifest physical and physiological symptoms or reactions caused by the use of any controlled dangerous substance.

c. In addition to the general penalty prescribed for a disordlerly person's offense pursuant to N.J.S. 2A:169-4, every person adjudged a disorderly person for a violation of this subsection shall, at the discretion of the sentencing judge, forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of not more than 2 years from the date of his conviction and until such privilege shall be restored to him by the Director of Motor Vehicles upon application to and after certification by a physician to the director that such person is not a drug dependent person within the meaning of this act. The court before whom any person is convicted of a violation of this section shall cause a report of such conviction to be filed with the Director of Motor Vehicles.

L.1971, c. 226, § 20. Amended by L.1971, c. 3, § 9; L.1971, c. 367, § 3, eff. Dec. 28, 1971; L.1975, c. 31, § 2, eff. March 7, 1975.